

**UNITED STATES V. FE S. GARRETT**  
**U.S.D.C. Case No. 08cr0918-L**

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Southern District of California

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516 Industry Way  
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August 7, 2008

BY FEDERAL EXPRESS

Ms. Fe Garrett  
Register No. - 07990-298  
The Geo Group  
Western Region Detention Facility  
220 West C Street  
San Diego, CA 92101  
(619) 232-9221

Re: Notice of Intent to Introduce Evidence Pursuant to Federal Rule of Evidence 404(b)  
United States v. Fe S. Garrett, Criminal Case No. 08-CR-0918-L

Dear Ms. Garrett:

The United States provides to you this notice of its intent to introduce evidence of other crimes, wrongs, or acts pursuant to Federal Rule of Evidence 404(b). Rule 404(b) requires that the United States provide "reasonable notice . . . of the general nature" of such evidence the government intends to introduce at trial. The notice requirement (like Rule 404(b) itself) does not extend "to evidence of acts which are 'intrinsic' to the charged offense." Committee Note, Fed. R. Evid. 404(b); see also United States v. Beckman, 298 F.3d 788, 793-94 (9th Cir. 2002) ("Evidence of 'other acts' is not subject to Rule 404(b) analysis if it is 'inextricably intertwined' with the charged offense"); United States v. Kallin, 50 F.3d 689, 696 (9th Cir. 1995) (holding the admission of corporate tax returns for which prosecution would be barred by the statute of limitations was not subject to Rule 404(b) because it was part of a "larger scheme" to evade personal taxes for which the defendant was indicted).

The United States contends that evidence regarding the acts listed below should be admitted into evidence as inextricably intertwined with the offenses charged and is not subject to Rule 404(b). However, in an abundance of caution, the United States hereby gives you notice of its intention to introduce evidence of the following acts:

Re: Notice of Intent to Introduce Rule 404(b) Evidence  
United States v. Fe S. Garrett,  
Criminal Case No. 08CR0918-L



- (1) The preparation of federal individual income tax returns for the following taxpayers for the following years which contained false deductions:
  - a. 2000 Form 1040 for Homer and Myrna Dizon;
  - b. 2000 Form 1040 for Pepito Aure;
  - c. 2000 Form 1040 for Erwin Apsay and Michelle Davis;
  - d. 2000 Form 1040 for Ven and Zenaida Diomino;
  - e. 2000 Form 1040 for Jose Dante and Rosalina Colocado;
  - f. 2000 Form 1040 for Vincent and Jolene Hubbard;
  - g. 2000 Form 1040 for Lorenda Fabro;
- (2) The preparation of federal tax returns for the following taxpayers for the following years:
  - a. 2003 Form 1040 for Jose Dante and Rosalina Colocado;
  - b. 2003 Form 1040 for Thomas and Maria Miller;
- (3) The preparation of a false 2002 Form 1040 federal income tax return for "Ceclia Marie Vicente", who was in fact undercover Internal Revenue Service Special Agent Ceclia Braga;
- (4) All of the statements made to the undercover Internal Revenue Special Agent on April 2, 2003, regarding any and all past conduct, including but not limited to admissions of fabricating deductions on clients' prior federal income tax returns and fabricating a business on a prior client's federal income tax return;
- (5) All of Gregory Garrett, Sr.'s statements which were made to the undercover Internal Revenue Service Special Agent on August 6, 2003, including, but not limited to, admissions that other clients' federal tax returns contain fabricated and false Schedule A and Child Care Expense deductions;
- (6) Admissions made by you to Internal Revenue Service Special Agents on December 10, 2003, and July 3, 2007 regarding placing inflated deductions on clients' federal income tax returns.

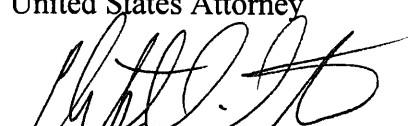
The United States has provided the above-listed federal individual income tax returns to the you in discovery. With respect to the evidence concerning the Internal Revenue Service undercover operation, the United States has provided recordings and transcripts of the April 2, 2003, and August 6, 2003 meetings with Fe Garrett and Gregory Garrett, Sr., as well as other recordings of the contacts the undercover agent had with individuals speaking on your behalf. The United States has also provided to you a copy of a Memorandum of Interviews that document your admissions to the Internal Revenue Service Special Agents on December 10, 2003 and July 3, 2007.

Re: Notice of Intent to Introduce Rule 404(b) Evidence  
United States v. Fe S. Garrett,  
Criminal Case No. 08CR0918-L

The United States intends to introduce evidence of the acts listed above as inextricably intertwined with the charged offenses and relevant as direct evidence of the offenses charged or, alternatively, as evidence of other acts which is admissible under Rule 404(b). The United States reserves the right to tender timely notice of evidence of additional acts that may also be direct evidence of an element of the offenses charged or, alternatively, as evidence of other acts admissible under Fed. R. Evid. 404(b).

Sincerely,

KAREN P. HEWITT  
United States Attorney



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CHRISTOPHER S. STRAUSS  
Special Assistant U.S. Attorney

cc: Erica Zunkel, Esq.  
Stand-by Counsel  
Federal Defenders of San Diego  
By facsimile: (619) 687-2666

Re: Notice of Intent to Introduce Rule 404(b) Evidence  
United States v. Fe S. Garrett,  
Criminal Case No. 08CR0918-L

**Fresno Service Center Criminal Investigation Branch**  
**Preparer Information Report**

Optional Information

Preparer Name:	FAYES TAX SERVICE
Address:	1210 E. 2nd St
	National City, CA 91950
SSN/EIN:	561-27-5934
Phone:	619-474-4221

Informant Name:	_____
Address:	_____
SSN/EIN:	_____
Phone:	_____

**Preparer Questions:**

1. How did you learn about the preparer?

2000 Income Tax Return of my new client, copy attached

2. What false information does the preparer use?

GIFTS TO CHARITY: Cash or Check \$8,000.00 & Non-Cash=\$2,800.00

3. How many returns are involved?

Hundreds to Thousands every year

4. Does he/she sign the returns?

Yes

5. What type of clients does the preparer have – farmworkers, business people, etc.?

INDIVIDUAL

6. Is the Earned Income Credit involved?

Maybe- Filing returns as Head of Household from married if taxpayer have dependent.

7. Does the preparer provide false W-2's?

I'm not sure

8. Does the preparer file electronic or paper returns? NO

9. Does the preparer issue refund anticipation loans? NO

10. What is the preparer's Electronic Filing Identification Number? Not applicable

GOVERNMENT  
EXHIBIT

2

11. Does the preparer have his clients sign blank returns?

I/m not sure

12. Does the preparer promise an amount of refund before the return is prepared?

Maybe because she charge more than hundred per client.

13. How does the preparer charge his clients? A set fee or percent of refund?

Cash payment. Hundreds by cash or set fee or percent of refund.

14. Do you know what address or addresses the preparer has the refund checks sent to?

Not applicable

15. Are returns computer generated?

YES

16. Does the preparer keep return data on computer disks? Where are they kept?

Same as above

17. Where are hard copies kept? SAM AS ABOVE

18. Has the preparer been audited/investigated by the IRS?

NOT YET I THINK BECAUSE I HEARD THIS PREPARER MANY YEARS AGO.

19. Do others assist in return preparation? not applicable

20. How are clients recruited?

WORD OF MOUTH OR RECOMMENDATION FROM HER CLIENTS DUE TO BIG REFUND AND CLAIMING EXCESSIVE DEDUCTIONS IN CONTRIBUTIONS & MISC. DEDUCATIONS SUCH AS UNIFORMS ETC.

Form 1040

Department of the Treasury - Internal Revenue Service

## U.S. Individual Income Tax Return

2000

(99)

IRS use only — Do not write or staple in this space.

For the year Jan 1-Dec 31, 2000, or other tax year beginning			2000, ending	20	OMB No. 1445-0074
Label (See instructions.)  Use the IRS label. Otherwise, please print or type.  Presidential Election Campaign (See instructions.)	Your First Name MI Last Name			Your Social Security Num	
	If a Joint Return, Spouse's First Name MI Last Name			Spouse's Social Security Number	
	Home Address (number and street). If You Have a P.O. Box, See Instructions.			Apartment No.	
	City, Town or Post Office. If You Have a Foreign Address. See Instructions.			State ZIP Code	

► Note: Checking 'Yes' will not change your tax or reduce your refund.  
Do you, or your spouse if filing a joint return, want \$3 to go to this fund? ►  Yes  No  Yes  No

Filing Status  Check only one box.	1 <input type="checkbox"/> Single				
	2 <input checked="" type="checkbox"/> Married filing joint return (even if only one had income)				
	3 <input type="checkbox"/> Married filing separate return. Enter spouse's SSN above & full name here ►				
	4 <input type="checkbox"/> Head of household (with qualifying person). (See instructions.) If the qualifying person is a child but not your dependent, enter this child's name here ►				
	5 <input type="checkbox"/> Qualifying widow(er) with dependent child (year spouse died ►). (See instructions.)				

Exemptions	6a <input checked="" type="checkbox"/> Yourself. If your parent (or someone else) can claim you as a dependent on his or her tax return, do not check box 6a			<input type="checkbox"/> No. of boxes checked on 6a and 6b	2
	b <input checked="" type="checkbox"/> Spouse				
c Dependents:	(1) First name	Last name	(2) Dependent's social security number	(3) Dependent's relationship to you	(4) <input checked="" type="checkbox"/> If qualifying child for child tax credit (see instructions)
					<input type="checkbox"/> No. of your children on 6c who: a. lived with you
					<input type="checkbox"/> b. did not live with you due to divorce or separation (see instructions)
					<input type="checkbox"/> Dependents on 6c not entered above
					Add numbers entered on lines above ► 2
d Total number of exemptions claimed					

Income  Attach Forms W-2 and W-2G here. Also attach Form(s) 1099-R if tax was withheld.  If you did not get a W-2, see instructions.  Enclose, but do not attach, any payment. Also, please use Form 1040-V.	7 Wages, salaries, tips, etc. Attach Form(s) W-2	7	85,468.	
	8a Taxable interest. Attach Schedule B if required	8a		
	b Tax-exempt interest. Do not include on line 8a	8b		
	9 Ordinary dividends. Attach Schedule B if required	9		
	10 Taxable refunds, credits, or offsets of state and local income taxes (see instructions)	10	991.	
	11 Alimony received	11		
	12 Business income or (loss). Attach Schedule C or C-EZ	12		
	13 Capital gain or (loss). Attach Schedule D if required. If not required, check here ► <input type="checkbox"/>	13		
	14 Other gains or (losses). Attach Form 4797	14		
	15a Total IRA distributions	15a	b Taxable amount (see instrs)	15b
	16a Total pensions & annuities	16a	b Taxable amount (see instrs)	16b
	17 Rental real estate, royalties, partnerships, S corporations, trusts, etc. Attach Schedule E	17		
	18 Farm income or (loss). Attach Schedule F	18		
	19 Unemployment compensation	19		
	20a Social security benefits	20a	b Taxable amount (see instrs)	20b
21 Other income. List type & amount (see instrs)	21			
22 Add the amounts in the far right column for lines 7 through 21. This is your total income ►	22	86,459.		

Adjusted Gross Income	23 IRA deduction (see instructions)	23	
	24 Student loan interest deduction (see instructions)	24	
	25 Medical savings account deduction. Attach Form 8853	25	
	26 Moving expenses. Attach Form 3903	26	
	27 One-half of self-employment tax. Attach Schedule SE	27	
	28 Self-employed health insurance deduction (see instructions)	28	
	29 Self-employed SEP, SIMPLE, and qualified plans	29	
	30 Penalty on early withdrawal of savings	30	
	31a Alimony paid b Recipient's SSN	31a	
	32 Add lines 23 through 31a	32	
	33 Subtract line 32 from line 22. This is your adjusted gross income	33	86,459.

BAA For Disclosure, Privacy Act, and Paperwork Reduction Act Notice, see instructions.

Form 1040 (2000)

FDIA0112 11/07/00

Form 1040 (2000)

Page 2

<b>Tax and Credits</b>  Standard Deduction for Most People  Single: \$4,400  Head of household: \$6,450  Married filing jointly or Qualifying widow(er): \$7,350  Married filing separately: \$3,675	34 Amount from line 33 (adjusted gross income) .....	34	86,459.
	35a Check if: <input type="checkbox"/> You were 65/older, <input type="checkbox"/> Blind; <input type="checkbox"/> Spouse was 65/older, <input type="checkbox"/> Blind. Add the number of boxes checked above and enter the total here .....	35a	
	b If you are married filing separately and your spouse itemizes deductions, or you were a dual-status alien, see instructions and check here .....	35b	
	36 Enter your itemized deductions from Schedule A, line 28, or standard deduction shown on the left. But see instructions to find your standard deduction if you checked any box on line 35a or 35b or if someone can claim you as a dependent .....	36	37,777.
	37 Subtract line 36 from line 34 .....	37	48,682.
	38 If line 34 is \$96,700 or less, multiply \$2,800 by the total number of exemptions claimed on line 6d. If line 34 is over \$96,700, see the worksheet in the instructions for the amount to enter .....	38	5,600.
	39 Taxable income. Subtract line 38 from line 37. If line 38 is more than line 37, enter -0- .....	39	43,082.
	40 Tax (see instrs). Check if any tax is from a <input type="checkbox"/> Form(s) 8814 b <input type="checkbox"/> Form 4972 .....	40	6,461.
	41 Alternative minimum tax. Attach Form 6251 .....	41	
	42 Add lines 40 and 41 .....	42	6,461.
43 Foreign tax credit. Attach Form 1116 if required .....	43		
44 Credit for child and dependent care expenses. Attach Form 2441 .....	44		
45 Credit for the elderly or the disabled. Attach Schedule R .....	45		
46 Education credits. Attach Form 8863 .....	46		
47 Child tax credit (see instructions) .....	47		
48 Adoption credit. Attach Form 8839 .....	48		
49 Other. Check if from a <input type="checkbox"/> Form 3800 b <input type="checkbox"/> Form 8396 c <input type="checkbox"/> Form 8801 d <input type="checkbox"/> Form (specify) .....	49		
50 Add lines 43 through 49. These are your total credits .....	50		
51 Subtract line 50 from line 42. If line 50 is more than line 42, enter -0- .....	51	6,461.	
52 Self-employment tax. Attach Schedule SE .....	52		
53 Social security and Medicare tax on tip income not reported to employer. Attach Form 4137 .....	53		
54 Tax on IRAs, other retirement plans, and MSAs. Attach Form 5329 if required .....	54		
55 Advance earned income credit payments from Form(s) W-2 .....	55		
56 Household employment taxes. Attach Schedule H .....	56		
57 Add lines 51-56. This is your total tax .....	57	6,461.	

<b>Payments</b>  If you have a qualifying child, attach Schedule EIC.	58 Federal income tax withheld from Forms W-2 and 1099 .....	58	8,741.
	59 2000 estimated tax payments and amount applied from 1999 return .....	59	
	60a Earned income credit (EIC) .....	60a	
	b Nontaxable earned income: amount .....		
	and type .....		
	61 Excess social security and RRTA tax withheld (see instrs) .....	61	
	62 Additional child tax credit. Attach Form 8812 .....	62	
	63 Amount paid with request for extension to file (see instructions) .....	63	
	64 Other payments. Check if from a <input type="checkbox"/> Form 2439 b <input type="checkbox"/> Form 4136 .....	64	
	65 Add lines 58, 59, 60a, and 61 through 64. These are your total payments .....	65	8,741.

<b>Refund</b>  Have it directly deposited! See instructions and fill in 67b, 67c, and 67d.	66 If line 65 is more than line 57, subtract line 57 from line 65. This is the amount you overpaid .....	66	2,280.
	67a Amount of line 66 you want refunded to you .....	67a	2,280.
	b Routing number .....	c Type: <input type="checkbox"/> Checking <input type="checkbox"/> Savings	
	d Account number .....		
68 Amount of line 66 you want applied to your 2001 estimated tax .....	68		

<b>Amount You Owe</b>	69 If line 57 is more than line 65, subtract line 65 from line 57. This is the amount you owe. For details on how to pay, see instructions .....	69	
	70 Estimated tax penalty. Also include on line 69 .....	70	

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.			
Your Signature	Date	Your Occupation	Daytime Phone Number FDIA0112 10/30/00
►		MAIL CARRIER	
Spouse's Signature. If a Joint Return, Both Must Sign.		Date	Spouse's Occupation
►		QUALITY INSPECTOR	
May the IRS discuss this return with the preparer shown below (see instructions)?		<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	

<b>Paid Preparer's Use Only</b>	Preparer's Signature ►	Date	Preparer's SSN or PTIN
	Firm's Name (or yours if self-employed), Address, and ZIP Code	04/03/2001 Check if self-employed <input checked="" type="checkbox"/>	561-27-5934
	► FAYES TAX SERVICE 1210 E. 2ND ST. NATIONAL CITY CA 91950	EIN	(619) 474-4221
Phone No.			

Form 1040 (2000)

Schedule A  
(Form 1040)

## Itemized Deductions

OMB No. 1545-0074

2000

07

Department of the Treasury  
Internal Revenue Service (99)

Name(s) Shown on Form 1040

Your Social Security Number

Medical and Dental Expenses	Caution. Do not include expenses reimbursed or paid by others.		
	1 Medical and dental expenses (see instructions) .....	1	
	2 Enter amount from Form 1040, line 34 .....	2	
	3 Multiply line 2 above by 7.5% (.075) .....	3	
Taxes You Paid (See instructions.)	4 Subtract line 3 from line 1. If line 3 is more than line 1, enter -0- .....	4	
	5 State and local income taxes .....	5	2,991.
	6 Real estate taxes (see instructions) .....	6	2,000.
	7 Personal property taxes .....	7	950.
Interest You Paid (See instructions.)	8 Other taxes. List type and amount > .....	8	
	9 Add lines 5 through 8 .....	9	5,941.
	10 Home mortgage interest and points reported to you on Form 1098 .....	10	20,372.
	11 Home mortgage interest not reported to you on Form 1098. If paid to the person from whom you bought the home, see instructions and show that person's name, identifying number, and address -	11	
Note. Personal interest is not deductible.	12 Points not reported to you on Form 1098. See instructions for special rules .....	12	
	13 Investment interest. Attach Form 4952 if required. (See instructions.) .....	13	
	14 Add lines 10 through 13 .....	14	20,372.
	15 Gifts by cash or check. If you made any gift of \$250 or more, see instructions .....	15	8,000.
If you made a gift and got a benefit for it, see instructions.	16 Other than by cash or check. If any gift of \$250 or more, see instructions. You must attach Form 8283 if over \$500 .....	16	2,800.
	17 Carryover from prior year .....	17	
	18 Add lines 15 through 17 .....	18	10,800.
Casualty and Theft Losses	19 Casualty or theft loss(es). Attach Form 4684. (See instructions.) .....	19	
Job Expenses and Most Other Miscellaneous Deductions (See instructions for expenses to deduct here.)	20 Unreimbursed employee expenses - job travel, union dues, job education, etc. You must attach Form 2106 or 2106-EZ if required. (See instructions.) > .....	20	
	21 Tax preparation fees .....	21	160.
	22 Other expenses - investment, safe deposit box, etc. List type and amount > .....	22	2,233.
	23 Add lines 20 through 22 .....	23	2,393.
Other Miscellaneous Deductions	24 Enter amount from Form 1040, line 34 .....	24	86,459.
	25 Multiply line 24 above by 2% (.02) .....	25	1,729.
	26 Subtract line 25 from line 23. If line 25 is more than line 23, enter -0- .....	26	664.
	27 Other - from list in the instructions. List type and amount > .....	27	
Total Itemized Deductions	28 Is Form 1040, line 34, over \$128,950 (over \$64,475 if married filing separately)?	28	37,777.
	<input checked="" type="checkbox"/> No. Your deduction is not limited. Add the amounts in the far right column for lines 4 through 27. Also, enter this amount on Form 1040, line 36.		
	<input type="checkbox"/> Yes. Your deduction may be limited. See instructions for the amount to enter.		

BAA For Paperwork Reduction Act Notice, see separate instructions.

Schedule A (Form 1040) 2000

FDIA0301 10/25/00

Schedule A  
Lines 20, 22, 27**Miscellaneous Itemized Deductions Statement**

2000

► Attach to return (after all IRS forms)

Statement

Name(s) Shown on Return

Social Security Number

**Employee Business Expenses – Subject to 2% Limitation**

1	Unreimbursed employee expenses from Form 2106 .....	1	
2	Excluded expenses from Form 2555 .....	2	
3	Other unreimbursed employee business expenses:		
a	Union and professional dues .....	3 a	
b	Professional subscriptions .....	b	
c	Uniforms and protective clothing .....	c	
d	Job search costs .....	d	
e	Other:	e	
4	Total unreimbursed employee business expenses .....	4	

**Miscellaneous Expenses – Subject to 2% Limitation**Investment  
Expense ↓

5	Depreciation and amortization deductions .....	5	
6	Casualty/theft losses of property used in services as an employee .....	6	
7	REMIC expenses, from Schedule E .....	7	
8	Investment expenses related to interest and dividend income .....	8	
9	Deductions related to portfolio income, miscellaneous deductions, and excess deductions on termination, from Schedule(s) K-1 .....	9	
10	Miscellaneous deductions excluded on Form 2555 .....	10	
11	Other miscellaneous expenses:		
a	Investment counsel and advisory fees .....	11 a	
b	Certain attorney and accounting fees .....	b	
c	Safe deposit box rental fees .....	c	
d	IRA custodial fees .....	d	
e	Other:	e	
	UNIFORMS (NET AFTER ALLOW)		1,298.
	UNIFORMS UPKEEP		425.
	SAFETY SHOES		510.
12	Total miscellaneous expenses .....	12	2,233.

**Other Miscellaneous Deductions – Not Subject to 2% Limitation**

13	Federal estate tax paid on decedent's income reported on this return .....	13	
14	Miscellaneous deductions excluded on Form 2555 .....	14	
15	Impairment-related expenses of a handicapped employee, from Form 2106 .....	15	
16	Amortizable bond premiums on bonds acquired before 10/23/86 .....	16	
17	Gambling losses (to the extent of gambling income) .....	17	
18	Casualty/theft losses of income-producing property .....	18	
19	Other miscellaneous deductions:		
20	Total other miscellaneous deductions .....	20	

Form 8283

(Rev October 1998)

Department of the Treasury  
Internal Revenue Service

Name(s) Shown on Your Income Tax Return

## Noncash Charitable Contributions

OMB No. 1545-0908

- Attach to your tax return if you claimed a total deduction of over \$500 for all contributed property.  
 ► See separate instructions.

55

Identifying Number

**Note:** Figure the amount of your contribution deduction before completing this form. See your tax return instructions.**Section A** — List in this section only items (or groups of similar items) for which you claimed a deduction of \$5,000 or less. Also, list certain publicly traded securities even if the deduction is over \$5,000 (see instructions).**Part I** Information on Donated Property — If you need more space, attach a statement.

1	(a) Name and address of the donee organization	(b) Description of donated property
A	AMVETS SAN DIEGO, CA	CLOTHINGS, DRESS SHOES, POTS & PANS, RUGS, DRAPERIES, MIX FURNITURES,
B	AMVETS SAN DIEGO, CA	LAMPS, SMALL APPL., KNICKNACKS, WASHER, TV, EXERCISER EQUIP., BIKE,
C	AMVETS SAN DIEGO, CA	SOFT COVER POCKET BOOKS, MIX BOOKS, TOYS, CANNED/DRY GOODS, TOOLS,
D	SALVATION ARMY SAN DIEGO, CA	VIDEO MOVIE TAPES, RECORDS, TAPES, BOWLING BALL WITH BAG, PAINTINGS,
E	SALVATION ARMY SAN DIEGO, CA	POSTERS, AND LOTS OF MISCL.

**Note:** If the amount you claimed as a deduction for an item is \$500 or less, you do not have to complete columns (d), (e), and (f).

(c)	Date of the contribution	(d)	Date acquired by donor (mo, yr)	(e)	How acquired by donor	(f)	Donor's cost or adjusted basis	(g)	Fair market value	(h)	Method used to determine the fair market value
A	Various							2,800		COMPARABLE APPROACH	
B											
C											
D											
E											

**Part II** Other Information — Complete line 2 if you gave less than an entire interest in property listed in Part I. Complete line 3 if conditions were attached to a contribution listed in Part I.

2 If, during the year, you contributed less than the entire interest in the property, complete lines a - e.

a Enter the letter from Part I that identifies the property ► \_\_\_\_\_ . If Part II applies to more than one property, attach a separate statement.

b Total amount claimed as a deduction for the property listed in Part I: (1) For this tax year ..... ► \_\_\_\_\_  
 (2) For any prior tax years ..... ► \_\_\_\_\_c Name and address of each organization to which any such contribution was made in a prior year (complete only if different than the donee organization above):  
 \_\_\_\_\_  
 \_\_\_\_\_

Name of Charitable Organization (donee)

Address (number, street, and room or suite no.)

City or Town

State ZIP Code

d For tangible property, enter the place where the property is located or kept ► \_\_\_\_\_

e Name of any person, other than donee organization, having actual possession of the property ► \_\_\_\_\_

3 If conditions were attached to any contribution listed in Part I, answer questions a - c and attach the required statement

(see instructions):

a Is there a restriction, either temporary or permanent, on the donee's right to use or dispose of the donated property? \_\_\_\_\_

b Did you give to anyone (other than the donee organization or another organization participating with the donee organization in cooperative fundraising) the right to the income from the donated property or to the possession of the property, including the right to vote donated securities, to acquire the property by purchase or otherwise, or to designate the person having such income, possession, or right to acquire? \_\_\_\_\_

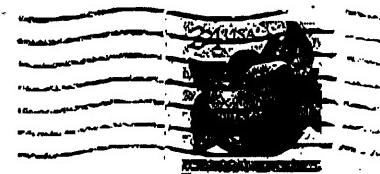
c Is there a restriction limiting the donated property for a particular use? \_\_\_\_\_

Yes	No

BAA For Paperwork Reduction Act Notice, see separate instructions.

Form 8283 (Rev 10-98)

Duty Agent - San Diego FO



INTERNAL REVENUE SERVICE  
Attn: Public Affairs Office  
P.O. Box 30210  
Laguna Niguel, CA 92677

CJ

RECEIVED  
INTERNAL REVENUE SERVICE  
M.R. I.I. 2002  
CRIMINAL INVESTIGATION DIVISION  
SAN DIEGO, CALIFORNIA

9260740210

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## Non-Custody Statement of Rights

(At the outset of your first official meeting with the subject of an investigation, identify yourself as a special agent of the IRS and produce authorized credentials. THEN STATE:)

" As a special agent, one of my functions is to investigate the possibility of criminal violations of the Internal Revenue laws, and related offenses.

" In connection with my investigation of your tax liability (or other matter), I would like to ask you some questions. However, first I advise you that under the 5th Amendment to the Constitution of the U.S., I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any documents which you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of any attorney before responding.

" Do you understand these rights? "

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GOVERNMENT  
EXHIBIT

### Statement of Rights

Before we search your premises (or person or conveyance) you should be aware of your rights under the Fourth Amendment to the Constitution.

You have the right to refuse to permit us to enter your premises (or to search your person or conveyance).

If you voluntarily permit us to enter and search your premises (or to search your person or conveyance) any incriminating evidence that we find may be used against you in court, or other proceedings.

Prior to permitting us to search, you have the right to require us to secure a search warrant.

### Waiver

I have read the above statement of my rights and, fully understanding these rights, I waive them freely and voluntarily, without threat or intimidation and without any promise of reward or immunity.

**Person, premises or conveyance to be searched:**

**Location of search:**

2642 Broadrick Way, San Diego, CA 92139

**Date:** Dec. 10, 2003

**Time:** 12:15 pm

D. Wickstrom  
J. S. Parikh 12/10/03

Name

**Witness:**

Maria Alvarez - Special Agent Jon Bradley - Special Agent  
Name Special Agent

Edward A. Ry - SPECIAL AGENT  
Name

Title

Toni Haas - Special Agent

12:15 pm 12/10/03

GOVERNMENT  
EXHIBIT

4

AND GREG M. GARRETT

I, FE S. GARRETT, CONSENT TO TURNING OVER RECORDS  
DETAILED IN THE ATTACHED 15 PAGES TO AGENTS  
OF THE INTERNAL REVENUE SERVICE. THE RECORDS WERE  
FOUND AT 2442 BROADRICK WAY, SAN DIEGO, CA  
92139 ON DECEMBER 10, 2003.

FE S. Garrett  
FE S. GARRETT  
Greg M. Garrett  
GREG M. GARRETT

12/10/03  
DATE  
12/10/03  
DATE

WITNESS:

Edward R.  
EDWARD REYES  
Len Bradley  
LEN BRADLEY

12/10/03  
DATE  
12/10/03  
DATE

I, DULCE WICKSTROM, CONSENT TO TURNING OVER RECORDS DETAILED ON THE ATTACHED 15 PAGES TO AGENTS OF THE INTERNAL REVENUE SERVICE. THE RECORD WERE FOUND AT MY RESIDENCE LOCATED AT 2642 BROADRICK WAY, SAN DIEGO, CA 92139 ON DECEMBER 10, 2003.

Dulce Wickstrom

DULCE WICKSTROM

12/10/03

DATE

Edward A. Reyes

EDWARD REYES, SPECIAL AGENT

12/10/03

DATE

Toni Haas

TONI HAAS, SPECIAL AGENT

12/10/03

DATE

1  
2  
3  
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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

## 8 UNITED STATES OF AMERICA,

CASE NO. 07cr0491 BTM

**Plaintiff,**

MANUEL MARTINEZ-COVARRUBIAS,

## **ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT**

**Defendant.**

14 Defendant Manuel Martinez-Covarrubias has filed a Motion to Dismiss the Indictment  
15 Due to Erroneous Grand Jury Instruction. For the reasons discussed below, Defendant's  
16 motion is **DENIED**.

## I. BACKGROUND

On February 28, 2007, a federal grand jury empaneled in this district on January 11, 2007 returned a two-count Indictment charging Defendant with Importation of Methamphetamine, in violation of 21 U.S.C. §§ 952 and 960, and Possession of Methamphetamine with Intent to Distribute, in violation of 21 U.S.C. § 841(a)(1).

## II. CHALLENGED INSTRUCTIONS

24 | A. Video Presentation

Prior to the selection of the grand jury jury, the potential grand jurors were shown a video titled "The Federal Grand Jury: The People's Panel." The video's apparent purpose is to educate potential grand jurors about their civic duty to serve, the function of the grand jury, and their responsibilities as grand jurors.



1       The video presents the story of a woman who serves on a grand jury for the first time.  
 2 In one scene, after the woman receives the summons, her son tells her what he has learned  
 3 about the function of a grand jury. Reading from a civics book, the son states that if the "jury  
 4 finds that probable cause does exist, then it will return a written statement of charges called  
 5 an indictment . . . ."

6       When charging the impaneled grand jury, the fictional judge explains that if the grand  
 7 jury finds that there is probable cause, "you will return an indictment."

8       Later, the foreperson tells the other grand jurors that there are two purposes of the  
 9 grand jury: (1) when there is a finding of probable cause, to bring the accused to trial fairly  
 10 and swiftly; and (2) to protect the innocent against unfounded prosecution.

11

12 B. Voir Dire Session

13       Before commencing voir dire, the empaneling judge, the Hon. Larry A. Burns,  
 14 explained the function of the grand jury to the prospective jurors as follows: "The grand jury  
 15 is determining really two factors: 'Do we have a reasonable – collectively, do we have a  
 16 reasonable belief that a crime was committed? And second, do we have a reasonable belief  
 17 that the person that they propose that we indict committed the crime?' If the answer is 'yes'  
 18 to both of those, then the case should move forward. If the answer to either of the questions  
 19 is 'no,' then the grand jury should hesitate and not indict." App. 2 to Gov't Response at 8.

20       During voir dire, Judge Burns explained to the potential grand jurors that the  
 21 presentation of the evidence to the grand jury was going to be one-sided. Id. at 14.  
 22 However, Judge Burns stated, "Now, having told you that, my experience is that the  
 23 prosecutors don't play hide-the-ball. If there's something adverse or that cuts against the  
 24 charge, you'll be informed of that. They have a duty to do that." Id. at 14-15.

25       One prospective juror, a retired clinical social worker, indicated that he did not believe  
 26 that any drugs should be considered illegal. Id. at 16. He also stated that he had strong  
 27 feelings about immigration cases and thought the government was spending a lot of time  
 28 unnecessarily persecuting people. Id. The following exchange occurred:

1           The Court: Now, the question is can you fairly evaluate those cases? Just as  
 2           the Defendant ultimately is entitled to a fair trial and the person that's accused  
 3           is entitled to a fair appraisal of the evidence of the case that's in front of you,  
 4           so, too, is the United States entitled to a fair judgment. If there's probable  
 5           cause, then the case should go forward. I wouldn't want you to say, "Well,  
 6           yeah, there's probable cause. But I still don't like what our Government is  
 7           doing. I disagree with these laws, so I'm not going to vote for it to go forward."  
 8           If that's your frame of mind, then probably you shouldn't serve. Only you can  
 9           tell me that.

10           Prospective Juror: Well, I think I may fall in that category.

11           The Court: In the latter category?

12           Prospective Juror: Yes.

13           The Court: Where it would be difficult for you to support a charge even if you  
 14           thought the evidence warranted it?

15           Prospective Juror: Yes.

16           The Court: I'm going to excuse you, then. I appreciate your honest answers.

17           Id. at 16-17.

18           Later, another prospective juror, a real estate agent, expressed a concern regarding  
 19           the disparity between state and federal law with respect to medical marijuana. Judge Burns  
 20           responded:

21           Well, those things – the consequences of your determination shouldn't concern  
 22           you in the sense that penalties or punishment, things like that – we tell trial  
 23           jurors, of course, that they cannot consider the punishment or the  
 24           consequence that Congress has set for these things. We'd ask you to also  
 25           abide by that. We want you to make a business-like decision and look at the  
 26           facts and make a determination of whether there was a [sic] probable cause.

27           Id. at 25.

28           Subsequently, the prospective juror stated that he felt that drugs should be legal and  
 29           that rapists and murderers, not people using drugs, should go to jail. Id. at 25-26. The  
 30           following exchange ensued:

31           The Court: I think rapists and murderers ought to go to jail too. It's not for me  
 32           as a judge to say what the law is. We elect legislators to do that. We're sort  
 33           of at the end of the pipe on that. We're charged with enforcing the laws that  
 34           Congress gives us.

35           I can tell you sometimes I don't agree with some of the legal decisions  
 36           that are indicated that I have to make. But my alternative is to vote for  
 37           someone different, vote for someone that supports the policies I support and  
 38           get the law changed. It's not for me to say, "Well, I don't like it. So I'm not  
 39           going to follow it here."

40           You'd have a similar obligation as a grand juror even though you might

1 have to grit your teeth on some cases. Philosophically, if you were a member  
 2 of congress, you'd vote against, for example, criminalizing marijuana. I don't  
 3 know if that's it but you'd vote against criminalizing some drugs.

4 That's not what your prerogative is here. Your prerogative instead is to  
 5 act like a judge and to say, "All right. This is what I've got to deal with  
 6 objectively. Does it seem to me that a crime was committed? Yes. Does it  
 7 seem to me that this person's involved? It does." And then your obligation, if  
 8 you find those things to be true, would be to vote in favor of the case going  
 9 forward.

10 I can understand if you tell me, "Look, I get all that, but I just can't do it  
 11 or I wouldn't do it." I don't know what your frame of mind is. You have to tell  
 12 me about that.

13 Prospective Juror: I'm not comfortable with it.

14 The Court: Do you think you'd be inclined to let people go on drug cases even  
 15 though you were convinced there was probable cause they committed a drug  
 16 offense?

17 Prospective Juror: It would depend upon the case.

18 The Court: Is there a chance that you would do that?

19 Prospective Juror: Yes.

20 The Court: I appreciate your answers. I'll excuse you at this time.

21 Id. at 26-28.

22 Later, a potential juror said that he was "soft" on immigration because he had done  
 23 volunteer work with immigrants in the field, but that he could be fair and objective. Judge  
 24 Burns stated: "As you heard me explain earlier to one of the prospective grand jurors, we're  
 25 not about trying to change people's philosophies and attitudes here. That's not my business.  
 26 But what I have to insist on is that you follow the law that's given to us by the United States  
 27 Congress. We enforce the federal laws here." Id. at 61. This juror was not excused.

### 28 C. Charge to Imppaneled Grand Jury

29 After the grand jury was impaneled, Judge Burns gave further instructions regarding  
 30 the responsibilities of the grand jurors.

31 With respect to the enforcement of federal laws, Judge Burns explained:

32 But it's not for you to judge the wisdom of the criminal laws enacted by  
 33 Congress; that is, whether or not there should be a federal law or should not  
 34 be a federal law designating certain activity is [sic] criminal is not up to you.  
 35 That's a judgment that Congress makes.

36 And if you disagree with that judgment made by Congress, then your

1 option is not to say, 'Well, I'm going to vote against indicting even though I  
 2 think that the evidence is sufficient' or 'I'm going to vote in favor of [indictment]  
 3 even though the evidence may be insufficient.' Instead, your obligation is to  
 4 contact your congressman or advocate for a change in the laws, but not to  
 5 bring your personal definition of what the law ought to be and try to impose that  
 6 through applying it in a grand jury setting.

7 Furthermore, when you're deciding whether to indict or not to indict, you  
 8 shouldn't be concerned with punishment that attaches to the charge. I think  
 9 I also alluded to this in the conversation with one gentleman. Judges alone  
 10 determine punishment. We tell trial juries in criminal cases that they're not to  
 11 be concerned with the matter of punishment either. Your obligation at the end  
 12 of the day is to make a business-like decision on facts and apply those facts  
 13 to the law as it's explained and read to you.

14 App. 1 to Gov't Response at 8-9.

15 With respect to exculpatory evidence, Judge Burns stated: "As I told you, in most  
 16 instances, the U.S. Attorneys are duty-bound to present evidence that cuts against what they  
 17 may be asking you to do if they're aware of that evidence." Id. at 20. Later, Judge Burns  
 18 said, "If past experience is any indication of what to expect in the future, then you can expect  
 19 that the U.S. Attorneys that will appear in front of you will be candid, they'll be honest, that  
 20 they'll act in good faith in all matters presented to you." Id. at 27.

### 16 III. DISCUSSION

#### 17 A. Instructions Re: Role of Grand Jury

18 Defendant contends that statements made in the video, Judge Burns' instructions, and  
 19 the dismissal of two potential jurors deprived Defendant of the traditional functioning of the  
 20 Grand Jury. Specifically, Defendant claims that the challenged statements in combination  
 21 with the dismissal of the two potential jurors "flatly prohibited grand jurors from exercising  
 22 their constitutional discretion to not indict even if probable cause supports the charge."  
 23 (Def.'s Reply Br. 8.) Looking at the video presentation and the instructions as a whole, the  
 24 Court disagrees.

25 Judge Burns made it clear that the jurors were not to refuse to indict in the face of  
 26 probable cause *on the ground that they disagreed with Congress's decision to criminalize*  
 27 *certain activity*. Judge Burns did not err in doing so. In United States v. Navarro-Vargas, 408

1 F.3d 1184 (9th Cir. 2005) (“Navarro-Vargas II”), the Ninth Circuit upheld the model grand jury  
 2 instruction that states: “You cannot judge the wisdom of the criminal laws enacted by  
 3 Congress, that is, whether or not there should or should not be a federal law designating  
 4 certain activity as criminal. That is to be determined by Congress and not by you.” The  
 5 majority opinion observed that the instruction was not contrary to any long-standing historical  
 6 practice surrounding the grand jury and noted that shortly after the adoption of the Bill of  
 7 Rights, federal judges charged grand juries with a duty to submit to the law and to strictly  
 8 enforce it. Id. at 1193,1202-03. “We cannot say that the grand jury’s power to judge the  
 9 wisdom of the laws is so firmly established that the district court must either instruct the jury  
 10 on its power to nullify the laws or remain silent.” Id. at 1204.

11 A prohibition against judging the wisdom of the criminal laws enacted by Congress  
 12 amounts to the same thing as a prohibition against refusing to indict based on disagreement  
 13 with the laws. It is true that Judge Burns used stronger language that, viewed in isolation,  
 14 could be misconstrued as requiring the return of an indictment in *all* cases where probable  
 15 cause can be found. Particularly troubling is the following statement made to the real estate  
 16 agent: “Your prerogative instead is to act like a judge and to say, ‘All right. This is what I’ve  
 17 got to deal with objectively. Does it seem to me that a crime was committed? Yes. Does  
 18 it seem to me that this person’s involved? It does.’ *And then your obligation*, if you find  
 19 those things to be true, *would be to vote in favor of the case going forward.*” App. 2 to Gov’t  
 20 Response at 26. However, viewed in context, Judge Burns was not mandating the issuance  
 21 of an indictment in *all* cases where probable cause is found; he was explaining that  
 22 disagreement with the laws should not be an obstacle to the issuance of an indictment.<sup>1</sup>

23 Furthermore, the word “obligation” is not materially different than the word “should.”  
 24

---

25 <sup>1</sup> The Supreme Court has recognized that a grand jury is not required to indict in  
 26 every case where probable cause exists. In Vasquez v. Hillery, 474 U.S. 254, 263 (1986),  
 27 the Supreme Court explained: “The grand jury does not determine only that probable cause  
 28 exists to believe that a defendant committed a crime, or that it does not. In the hands of the  
 grand jury lies the power to charge a greater offense or a lesser offense; numerous counts  
 or a single count; and perhaps most significant of all, a capital offense or a noncapital offense  
 - all on the basis of the same facts. Moreover, [t]he grand jury is not bound to indict in every  
 case where a conviction can be obtained.’ United States v. Ciambrone, 601 F.2d 616, 629  
 (2d Cir. 1979) (Friendly, J., dissenting).”

1 In Navarro-Vargas II, the majority opinion held that the model instruction that the jurors  
 2 “should” indict if they find probable cause does not violate the grand jury’s independence.  
 3 The majority explained, “As a matter of pure semantics, it does not ‘eliminate discretion on  
 4 the part of the grand jurors,’ leaving room for the grand jury to dismiss even if it finds  
 5 probable cause.” Navarro-Vargas II, 408 F.3d at 1205 (quoting United States v. Marcucci,  
 6 299 F.3d 1156, 1159 (9th Cir. 2002)). The dissenting opinion notes that the word “should”  
 7 is used “to express a duty [or] obligation.” Id. at 1121 (quoting The Oxford American Diction  
 8 And Language Guide 931 (1999))(emphasis added).<sup>2</sup>

9       Defendant points to the language in the video where first the son, then the judge, state  
 10 that if there is a finding of probable cause, the grand jury “will” return an indictment.  
 11 However, no emphasis is placed on the word “will.” As spoken by the actors, the statements  
 12 are not directives, mandating the return of an indictment upon the finding of probable cause,  
 13 but, rather, descriptions of what is expected to occur. Similarly, the foreperson’s statement  
 14 that one of the purposes of the grand jury is to bring an accused to trial when there is a  
 15 finding of probable cause is a general statement of the grand jury’s function, not a command  
 16 to return an indictment in every case where probable cause exists.

17       Defendant also argues that Judge Burns improperly forbade the grand jury from  
 18 considering the potential punishment for crimes when deciding whether or not to indict.  
 19 Defendant relies on the following statement:

20       Well, those things – the consequences of your determination shouldn’t concern  
 21 you in the sense that penalties or punishment, things like that – we tell trial  
 22 jurors, of course, that they cannot consider the punishment or the  
 23 consequence that Congress has set for these things. *We’d ask you to also  
 abide by that.* We want you to make a business-like decision and look at the  
 24 facts and make a determination of whether there was a probable cause.  
 25  
 26 App. 2 to Gov’t Response at 25. (Emphasis added.) Although Judge Burns stated that trial  
 27 jurors *cannot* consider punishment, he did not impose such a restriction on the grand jurors.  
 28 Instead, Judge Burns *requested* that the grand jurors follow the same principle. Similarly,

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<sup>2</sup> Defendant concedes that at other times Judge Burns instructed that upon a finding of probable cause, the case “should” go forward. App. 2 to Gov’t Response at 8, 17; App. 1 to Gov’t Response at 4, 23.

1 during the formal charge, Judge Burns stated, “[y]ou *shouldn’t* be concerned with punishment  
 2 that attaches to the charge.” App. 1 to Gov’t Response at 8. (Emphasis added.)

3       In United States v. Cortez-Rivera, 454 F.3d 1038 (9th Cir. 2006), the Ninth Circuit  
 4 upheld a jury instruction that stated: “[W]hen deciding whether or not to indict, you *should not*  
 5 be concerned about punishment in the event of conviction; judges alone determine  
 6 punishment.” (Emphasis added.) Consistent with the reasoning in Marcucci and Navarro-  
Vargas II, the Ninth Circuit held that the instruction did not place an absolute bar on  
 8 considering punishment and was therefore constitutional. The instructions given by Judge  
 9 Burns regarding the consideration of punishment were substantially the same as the  
 10 instruction in Cortez-Rivera.

11       Neither Judge Burns nor the video pronounced a general prohibition against jurors  
 12 exercising their discretion to refuse to return an indictment in the face of probable cause.  
 13 In any case, “history demonstrates that grand juries do not derive their independence from  
 14 a judge’s instruction. Instead they derive their independence from an unreviewable power  
 15 to decide whether to indict or not.” Navarro-Vargas II, 408 F.3d at 1204.

16       Both the video and Judge Burns informed the jurors about the utmost secrecy of the  
 17 grand jury proceedings and their deliberations. The video and Judge Burns also emphasized  
 18 to the jury that they were independent of the Government and did not have to return an  
 19 indictment just because the Assistant U.S. Attorney asked them to. In the video, the judge  
 20 expressed approval at the fact that the grand jury did not return an indictment as to the  
 21 alleged driver of the get-away car. Judge Burns characterized the jury as “a buffer between  
 22 our Government’s ability to accuse someone of a crime and then putting that person through  
 23 the burden of standing trial.” App. 1 to Gov’t Response at 26. Judge Burns also told the  
 24 jurors that they were not to be a “rubber stamp” and were expected to depend on their  
 25 independent judgment. Id. at 27.

26       Even though the jurors were not explicitly instructed that they could use their  
 27 discretion to refuse to return an indictment, they retained that power by virtue of the secrecy  
 28 surrounding their deliberations and the unreviewability of their decisions. Nothing that Judge

1 Burns said or did impinged on the jurors' independence in this regard.

2 Defendant counters that the dismissal of the two potential jurors undermined the grand  
3 jury's independence from the very start. According to Defendant, when Judge Burns  
4 dismissed the jurors, the message was clear that they were to indict in every case where  
5 there was probable cause or they would be excused. Defendant contends that the remaining  
6 grand jurors could not have understood Judge Burns' actions in any other way. (Reply Br.  
7 18.) The Court disagrees.

8 Upon reading the voir dire transcript, it is apparent that the jurors were excused  
9 because they were biased against the government with respect to a whole category of  
10 criminal laws, not simply because they were independent-minded and might refuse to return  
11 an indictment in a case where probable cause exists. Judge Burns explained to the clinical  
12 social worker, "We're all products of our experience. We're not going to try to disabuse you  
13 of experiences or judgments that you have. What we ask is that you not allow those to  
14 control invariably the outcome of the cases coming in front of you; that you look at the cases  
15 fresh, you evaluate the circumstances, listen to the witness testimony, and then make an  
16 independent judgment." App. 2 to Gov't Response at 15. Judge Burns excused the social  
17 worker after he admitted that it would be difficult for him to return an indictment in drug or  
18 immigration cases.

19 Similarly, the real estate agent expressed that he thought drugs should be legal and  
20 that people using drugs should not be sent to jail. App. 2 to Gov't Response at 25-26. The  
21 real estate agent said that he was not comfortable with indicting in drug cases. Although he  
22 did not say that he would refuse to indict in all cases involving drugs, he admitted that  
23 because of his beliefs, there was a chance that he would refuse to return an indictment in a  
24 drug case even though there was probable cause. *Id.* at 27. The real estate agent's  
25 responses established that he had serious concerns regarding the criminalization of drugs  
26 and could not be impartial with respect to these cases

27 That bias was the reason for the dismissal of the first two potential jurors is confirmed  
28 by the dismissal of a third potential juror. This juror stated that he had a strong bias for the

1 Government. App. 2 to Gov't Response at 38. Judge Burns cautioned the juror that he  
2 should not "automatically defer to [the Government] or surrender the function and give the  
3 indictment decision to the U.S. Attorney. You have to make that independently." Id. at 40.  
4 Judge Burns emphasized once again the responsibility of the jurors to evaluate the facts of  
5 each case independently based on the evidence presented. Id. at 42-43. Demonstrating his  
6 even-handedness, Judge Burns explained, "I'm equally concerned with somebody who would  
7 say, 'I'm going to automatically drop the trap door on anybody the U.S. Attorney asks.' I  
8 wouldn't want you to do that." Id. at 44.

9 A reasonable grand juror would not have interpreted the dismissal of the first two  
10 potential jurors as a message that they must indict in all cases where probable cause is  
11 found or risk being excused from service. It was apparent to the other jurors that a lack of  
12 impartiality with respect to certain types of cases, *not* independence, was the reason for all  
13 three dismissals.

14 In sum, Judge Burns did not err in instructing the grand jurors that they were not to  
15 refuse to return an indictment on the ground that they disagreed with the laws. Furthermore,  
16 nothing in the video or Judge Burns' instructions nullified the grand jury's inherent power to  
17 refuse to indict for any reason whatsoever. As the Ninth Circuit noted in Navarro-Vargas II,  
18 408 F.3d at 1204, the grand jury's independence results from the secrecy of their  
19 deliberations and the unreviewability of their decisions. Nothing in the record shows any  
20 impediment to that independence.

21

22 B. Instructions re: Assistant U.S. Attorneys

23 Defendant also contends that Judge Burns committed structural error by making  
24 comments about the Assistant U.S. Attorney's duty to present evidence that "cuts against the  
25 charge." According to Defendant, not only did Judge Burns' comments contradict United  
26 States v. Williams, 504 U.S. 36 (1992), but also discouraged independent investigation,  
27 leading to inaccurate probable cause determinations. Defendant reasons that given Judge  
28 Burns' comments, the grand jurors would have assumed that if the prosecutor did not present

1 any exculpatory evidence, then none exists, rendering further investigation a waste of time.

2 Under Williams, prosecutors do not have a duty to present substantial exculpatory  
3 evidence to the grand jury. Although Assistant U.S. Attorneys apparently have an  
4 employment duty to disclose “substantial evidence that directly negates the guilt” of a subject  
5 of investigation (United States Attorneys’ Manual § 9-11.233), it does not appear that they  
6 have a broad duty to disclose all evidence that may be deemed exculpatory or adverse to  
7 the Government’s position.

8 Accordingly, Judge Burns’ comments regarding the duty of Assistant U.S. Attorneys  
9 to present adverse evidence were inaccurate. However, Judge Burns’ comments do not rise  
10 to the level of structural error. As discussed above, the video and Judge Burns stressed that  
11 the grand jury was independent of the Government. The video and Judge Burns also  
12 explained to the jury that they could direct the Assistant U.S. Attorney to subpoena additional  
13 documents or witnesses. App. 1 to Gov’t Response at 11, 24. The jurors were also told  
14 about their right to pursue their own investigation, even if the Assistant U.S. Attorney  
15 disagrees with the grand jury’s decision to pursue the subject. Id. at 12.

16 In light of the foregoing instructions, the Court does not agree that the grand jurors  
17 would assume that if the Government did not present any exculpatory evidence, none exists.  
18 A reasonable juror would understand that the Assistant U.S. Attorney may not be aware of  
19 certain exculpatory evidence, whether due to legitimate circumstances or inadequate  
20 investigation, and that further investigation by the grand jury may be needed to properly  
21 evaluate the evidence before them. Furthermore, Judge Burns told the jury that “in most  
22 instances” the U.S. Attorneys are duty-bound to present exculpatory evidence. App. 1 to  
23 Gov’t Response at 20. Based on this qualifying language, the grand jurors would have  
24 understood that the prosecutor is not always bound to present exculpatory evidence. Thus,  
25 “the structural protections of the grand jury” have not “been so compromised as to render the  
26 proceedings fundamentally unfair.” Bank of Nova Scotia v. United States, 487 U.S. 250, 257  
27 (1988).

28 If Defendant can establish that the Government in fact knew of exculpatory evidence

1 that was not presented to the grand jury and that this failure to present exculpatory evidence,  
2 in conjunction with Judge Burns' comments, "substantially influenced the grand jury's  
3 decision to indict" or raises "grave doubt" that the decision to indict was free from the  
4 substantial influence of such events, the Court may dismiss the indictment under its  
5 supervisory powers. Bank of Nova Scotia, 487 U.S. at 256. Therefore, the Court will grant  
6 Defendant leave to conduct discovery regarding what evidence was presented to the grand  
7 jury. If, based upon the discovery, Defendant can establish that he suffered actual prejudice,  
8 Defendant may renew his motion to dismiss the indictment.

9

10 **IV. CONCLUSION**

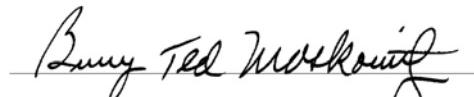
11 For the reasons discussed above, Defendant's Motion to Dismiss the Indictment Due  
12 to Erroneous Grand Jury Instruction is **DENIED WITHOUT PREJUDICE**.

13

14 **IT IS SO ORDERED.**

15

DATED: October 11, 2007



16  
17 Honorable Barry Ted Moskowitz  
18 United States District Judge

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45                   UNITED STATES DISTRICT COURT  
6                   SOUTHERN DISTRICT OF CALIFORNIA  
78                   UNITED STATES OF AMERICA,  
9    Plaintiff,  
10                   v.  
11                   DIANA JIMENEZ-BERMUDEZ,  
12    Defendant.CASE NO. 07cr1372 JAH  
AMENDED ORDER DENYING  
DEFENDANT'S MOTION TO  
DISMISS THE INDICTMENT13  
14                   Defendant Diana Jimenez-Bermudez has filed a Motion to Dismiss the Indictment  
15                   Due to Erroneous Grand Jury Instruction. For the reasons discussed below, Defendant's  
16                   motion is **DENIED**.17                   I. BACKGROUND18                   On February 28, 2007, a federal grand jury empaneled in this district on January  
19                   11, 2007 returned a two-count Indictment charging Defendant with Importation of  
20                   Methamphetamine, in violation of 21 U.S.C. §§ 952 and 960, and Possession of  
21                   Methamphetamine with Intent to Distribute, in violation of 21 U.S.C. § 841(a)(1).22                   II. CHALLENGED INSTRUCTIONS<sup>1</sup>23                   A. Voir Dire Session24                   Before commencing voir dire, the empaneling judge, the Hon. Larry A. Burns,  
25                   explained the function of the grand jury to the prospective jurors as follows: "The grand26  
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28                   <sup>1</sup>In her reply brief, Defendant makes a passing reference to the fact that the grand  
jurors were shown a video presentation on the role of the grand jury, however there is no  
substantive challenge to the use of the video, and thus use of the video will not be  
discussed in depth herein.

1 jury is determining really two factors: ‘Do we have a reasonable – collectively, do we have  
 2 a reasonable belief that a crime was committed? And second, do we have a reasonable  
 3 belief that the person that they propose that we indict committed the crime?’ If the  
 4 answer is ‘yes’ to both of those, then the case should move forward. If the answer to either  
 5 of the questions is ‘no,’ then the grand jury should hesitate and not indict.” App. 2 to  
 6 Gov’t Response at 8.

7 During voir dire, Judge Burns explained to the potential grand jurors that the  
 8 presentation of the evidence to the grand jury was going to be one-sided. Id. at 14.  
 9 However, Judge Burns stated, “Now, having told you that, my experience is that the  
 10 prosecutors don’t play hide-the-ball. If there’s something adverse or that cuts against the  
 11 charge, you’ll be informed of that. They have a duty to do that.” Id. at 14-15.

12 One prospective juror, a retired clinical social worker, indicated that he did not  
 13 believe that any drugs should be considered illegal. Id. at 16. He also stated that he had  
 14 strong feelings about immigration cases and thought the government was spending a lot  
 15 of time unnecessarily persecuting people. Id. The following exchange occurred:

16 The Court: Now, the question is can you fairly evaluate those cases? Just  
 17 as the Defendant ultimately is entitled to a fair trial and the person that’s  
 18 accused is entitled to a fair appraisal of the evidence of the case that’s in  
 19 front of you, so, too, is the United States entitled to a fair judgment. If  
 20 there’s probable cause, then the case should go forward. I wouldn’t want you  
 to say, “Well, yeah, there’s probable cause. But I still don’t like what our  
 Government is doing. I disagree with these laws, so I’m not going to vote  
 for it to go forward.” If that’s your frame of mind, then probably you  
 shouldn’t serve. Only you can tell me that.

21 Prospective Juror: Well, I think I may fall in that category.

22 The Court: In the latter category?

23 Prospective Juror: Yes.

24 The Court: Where it would be difficult for you to support a charge even if  
 25 you thought the evidence warranted it?

26 Prospective Juror: Yes.

27 The Court: I’m going to excuse you, then. I appreciate your honest answers.

28 Id. at 16-17.

Later, another prospective juror, a real estate agent, expressed a concern regarding

1 the disparity between state and federal law with respect to medical marijuana. Judge  
 2 Burns responded:

3 Well, those things – the consequences of your determination shouldn't  
 4 concern you in the sense that penalties or punishment, things like that – we  
 5 tell trial jurors, of course, that they cannot consider the punishment or the  
 6 consequence that Congress has set for these things. We'd ask you to also  
 7 abide by that. We want you to make a business-like decision and look at the  
 8 facts and make a determination of whether there was a [sic] probable cause.

9 Id. at 25.

10 Subsequently, the prospective juror stated that he felt that drugs should be legal and  
 11 that rapists and murderers, not people using drugs, should go to jail. Id. at 25-26. The  
 12 following exchange ensued:

13 The Court: I think rapists and murderers ought to go to jail too. It's not for  
 14 me as a judge to say what the law is. We elect legislators to do that. We're  
 15 sort of at the end of the pipe on that. We're charged with enforcing the laws  
 16 that Congress gives us.

17 I can tell you sometimes I don't agree with some of the legal decisions  
 18 that are indicated that I have to make. But my alternative is to vote for  
 19 someone different, vote for someone that supports the policies I support and  
 20 get the law changed. It's not for me to say, "Well, I don't like it. So I'm not  
 21 going to follow it here."

22 You'd have a similar obligation as a grand juror even though you  
 23 might have to grit your teeth on some cases. Philosophically, if you were a  
 24 member of congress, you'd vote against, for example, criminalizing  
 25 marijuana. I don't know if that's it but you'd vote against criminalizing  
 26 some drugs.

27 That's not what your prerogative is here. Your prerogative instead is  
 28 to act like a judge and to say, "All right. This is what I've got to deal with  
 29 objectively. Does it seem to me that a crime was committed? Yes. Does it  
 30 seem to me that this person's involved? It does." And then your obligation,  
 31 if you find those things to be true, would be to vote in favor of the case going  
 32 forward.

33 I can understand if you tell me, "Look, I get all that, but I just can't  
 34 do it or I wouldn't do it." I don't know what your frame of mind is. You  
 35 have to tell me about that.

36 Prospective Juror: I'm not comfortable with it.

37 The Court: Do you think you'd be inclined to let people go on drug cases  
 38 even though you were convinced there was probable cause they committed  
 39 a drug offense?

40 Prospective Juror: It would depend upon the case.

41 The Court: Is there a chance that you would do that?

42 Prospective Juror: Yes.

43 The Court: I appreciate your answers. I'll excuse you at this time.

1     Id. at 26-28.

2                 Later, a potential juror said that he was “soft” on immigration because he had done  
 3     volunteer work with immigrants in the field, but that he could be fair and objective. Judge  
 4     Burns stated: “As you heard me explain earlier to one of the prospective grand jurors, we’re  
 5     not about trying to change people’s philosophies and attitudes here. That’s not my  
 6     business. But what I have to insist on is that you follow the law that’s given to us by the  
 7     United States Congress. We enforce the federal laws here.” Id. at 61. This juror was not  
 8     excused.

9     **B. Charge to Impaneled Grand Jury**

10               After the grand jury was impaneled, Judge Burns gave further instructions regarding  
 11     the responsibilities of the grand jurors.

12               With respect to the enforcement of federal laws, Judge Burns explained:

13               But it’s not for you to judge the wisdom of the criminal laws enacted  
 14     by Congress; that is, whether or not there should be a federal law or should  
 15     not be a federal law designating certain activity is [sic] criminal is not up to  
 16     you. That’s a judgment that Congress makes.

17               And if you disagree with that judgment made by Congress, then your  
 18     option is not to say, ‘Well, I’m going to vote against indicting even though  
 19     I think that the evidence is sufficient’ or ‘I’m going to vote in favor of  
 20     [indictment] even though the evidence may be insufficient.’ Instead, your  
 21     obligation is to contact your congressman or advocate for a change in the  
 22     laws, but not to bring your personal definition of what the law ought to be  
 23     and try to impose that through applying it in a grand jury setting.

24               Furthermore, when you’re deciding whether to indict or not to indict,  
 25     you shouldn’t be concerned with punishment that attaches to the charge.  
 26     I think I also alluded to this in the conversation with one gentleman. Judges  
 27     alone determine punishment. We tell trial juries in criminal cases that  
 28     they’re not to be concerned with the matter of punishment either. Your  
 29     obligation at the end of the day is to make a business-like decision on facts  
 30     and apply those facts to the law as it’s explained and read to you.

31               App. I to Gov’t Response at 8-9.

32               With respect to exculpatory evidence, Judge Burns stated: “As I told you, in most  
 33     instances, the U.S. Attorneys are duty-bound to present evidence that cuts against what  
 34     they may be asking you to do if they’re aware of that evidence.” Id. at 20. Later, Judge  
 35     Burns said, “If past experience is any indication of what to expect in the future, then you  
 36     can expect that the U.S. Attorneys that will appear in front of you will be candid, they’ll  
 37     be honest, that they’ll act in good faith in all matters presented to you.” Id. at 27.

### **III. DISCUSSION**

**2 | A. Instructions Re: Role of Grand Jury**

Defendant contends that Judge Burns' instructions and the dismissal of two potential jurors deprived Defendant of the traditional functioning of the Grand Jury. Specifically, Defendant claims that the challenged statements in combination with the dismissal of the two potential jurors "flatly prohibited grand jurors from exercising their constitutional discretion to not indict even if probable cause supports the charge." (Def.'s Reply Br. 8.) Looking at the instructions as a whole, the Court disagrees.

Judge Burns made it clear that the jurors were not to refuse to indict in the face of probable cause *on the ground that they disagreed with Congress's decision to criminalize certain activity*. Judge Burns did not err in doing so. In United States v. Navarro-Vargas, 408 F.3d 1184 (9th Cir. 2005) ("Navarro-Vargas II"), the Ninth Circuit upheld the model grand jury instruction that states: "You cannot judge the wisdom of the criminal laws enacted by Congress, that is, whether or not there should or should not be a federal law designating certain activity as criminal. That is to be determined by Congress and not by you." The majority opinion observed that the instruction was not contrary to any long-standing historical practice surrounding the grand jury and noted that shortly after the adoption of the Bill of Rights, federal judges charged grand juries with a duty to submit to the law and to strictly enforce it. Id. at 1193, 1202-03. "We cannot say that the grand jury's power to judge the wisdom of the laws is so firmly established that the district court must either instruct the jury on its power to nullify the laws or remain silent." Id. at 1204.

22 A prohibition against judging the wisdom of the criminal laws enacted by Congress  
23 amounts to the same thing as a prohibition against refusing to indict based on  
24 disagreement with the laws. It is true that Judge Burns used stronger language that,  
25 viewed in isolation, could be misconstrued as requiring the return of an indictment in *all*  
26 cases where probable cause can be found. Particularly troubling is the following statement  
27 made to the real estate agent: "Your prerogative instead is to act like a judge and to say,  
28 'All right. This is what I've got to deal with objectively. Does it seem to me that a crime

1 was committed? Yes. Does it seem to me that this person's involved? It does.' *And then*  
 2 *your obligation*, if you find those things to be true, *would be to vote in favor of the case going*  
 3 *forward.*" App. 2 to Gov't Response at 26. However, viewed in context, Judge Burns was  
 4 not mandating the issuance of an indictment in *all* cases where probable cause is found;  
 5 he was explaining that disagreement with the laws should not be an obstacle to the  
 6 issuance of an indictment.<sup>2</sup>

7 Furthermore, the word "obligation" is not materially different than the word  
 8 "should." In Navarro-Vargas II, the majority opinion held that the model instruction that  
 9 the jurors "should" indict if they find probable cause does not violate the grand jury's  
 10 independence. The majority explained, "As a matter of pure semantics, it does not  
 11 'eliminate discretion on the part of the grand jurors,' leaving room for the grand jury to  
 12 dismiss even if it finds probable cause." Navarro-Vargas II, 408 F.3d at 1205 (quoting  
 13 United States v. Marcucci, 299 F.3d 1156, 1159 (9th Cir. 2002)). The dissenting opinion  
 14 notes that the word "should" is used "to express a duty [or] *obligation*." Id. at 1121  
 15 (quoting The Oxford American Diction And Language Guide 931 (1999)) (emphasis  
 16 added).<sup>3</sup>

17 Defendant also argues that Judge Burns improperly forbade the grand jury from  
 18 considering the potential punishment for crimes when deciding whether or not to indict.  
 19 Defendant relies on the following statement:

20 Well, those things – the consequences of your determination shouldn't  
 21 concern you in the sense that penalties or punishment, things like that – we  
 tell trial jurors, of course, that they cannot consider the punishment or the

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22       <sup>2</sup> The Supreme Court has recognized that a grand jury is not required to indict in  
 23 every case where probable cause exists. In Vasquez v. Hillery, 474 U.S. 254, 263 (1986),  
 24 the Supreme Court explained: "The grand jury does not determine only that probable  
 25 cause exists to believe that a defendant committed a crime, or that it does not. In the  
 26 hands of the grand jury lies the power to charge a greater offense or a lesser offense;  
 numerous counts or a single count; and perhaps most significant of all, a capital offense  
 or a noncapital offense - all on the basis of the same facts. Moreover, '[t]he grand jury is  
 27 not bound to indict in every case where a conviction can be obtained.' United States v.  
 Ciambrone, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)."

28       <sup>3</sup> Defendant concedes that at other times Judge Burns instructed that upon a finding  
 of probable cause, the case "should" go forward. App. 2 to Gov't Response at 8, 17; App.  
 1 to Gov't Response at 4, 23.

consequence that Congress has set for these things. *We'd ask you to also abide by that.* We want you to make a business-like decision and look at the facts and make a determination of whether there was a probable cause.

App. 2 to Gov't Response at 25. (Emphasis added.) Although Judge Burns stated that trial jurors *cannot* consider punishment, he did not impose such a restriction on the grand jurors. Instead, Judge Burns *requested* that the grand jurors follow the same principle. Similarly, during the formal charge, Judge Burns stated, “[y]ou *shouldn't* be concerned with punishment that attaches to the charge.” App. 1 to Gov’t Response at 8. (Emphasis added.)

In United States v. Cortez-Rivera, 454 F.3d 1038 (9th Cir. 2006), the Ninth Circuit upheld a jury instruction that stated: “[W]hen deciding whether or not to indict, you *should not* be concerned about punishment in the event of conviction; judges alone determine punishment.” (Emphasis added.) Consistent with the reasoning in Marcucci and Navarro-Vargas II, the Ninth Circuit held that the instruction did not place an absolute bar on considering punishment and was therefore constitutional. The instructions given by Judge Burns regarding the consideration of punishment were substantially the same as the instruction in Cortez-Rivera.

Judge Burns did not pronounce a general prohibition against jurors exercising their discretion to refuse to return an indictment in the face of probable cause. In any case, “history demonstrates that grand juries do not derive their independence from a judge’s instruction. Instead they derive their independence from an unreviewable power to decide whether to indict or not.” Navarro-Vargas II, 408 F.3d at 1204.

Judge Burns informed the jurors about the utmost secrecy of the grand jury proceedings and their deliberations. In addition, a video shown to the potential grand jurors titled, “The Federal Grand Jury: The People’s Panel,” which was intended to educate potential grand jurors about their responsibilities as grand jurors, also informed the jurors of the secrecy of the proceedings. Judge Burns and the video also emphasized to the jury that they were independent of the Government and did not have to return an indictment just because the Assistant U.S. Attorney asked them to. Judge Burns characterized the

1 jury as “a buffer between our Government’s ability to accuse someone of a crime and then  
2 putting that person through the burden of standing trial.” App. 1 to Gov’t Response at  
3 26. Judge Burns also told the jurors that they were not to be a “rubber stamp” and were  
4 expected to depend on their independent judgment. *Id.* at 27.

5 Even though the jurors were not explicitly instructed that they could use their  
6 discretion to refuse to return an indictment, they retained that power by virtue of the  
7 secrecy surrounding their deliberations and the unreviewability of their decisions. Nothing  
8 that Judge Burns said or did impinged on the jurors’ independence in this regard.

9 Defendant counters that the dismissal of the two potential jurors undermined the  
10 grand jury’s independence from the very start. According to Defendant, when Judge Burns  
11 dismissed the jurors, the message was clear that they were to indict in every case where  
12 there was probable cause or they would be excused. Defendant contends that the  
13 remaining grand jurors could not have understood Judge Burns’ actions in any other way.  
14 (Reply Br. 18.) The Court disagrees.

15 Upon reading the voir dire transcript, it is apparent that the jurors were excused  
16 because they were biased against the government with respect to a whole category of  
17 criminal laws, not simply because they were independent-minded and might refuse to  
18 return an indictment in a case where probable cause exists. Judge Burns explained to the  
19 clinical social worker, “We’re all products of our experience. We’re not going to try to  
20 disabuse you of experiences or judgments that you have. What we ask is that you not  
21 allow those to control invariably the outcome of the cases coming in front of you; that you  
22 look at the cases fresh, you evaluate the circumstances, listen to the witness testimony, and  
23 then make an independent judgment.” App. 2 to Gov’t Response at 15. Judge Burns  
24 excused the social worker after he admitted that it would be difficult for him to return an  
25 indictment in drug or immigration cases.

26 Similarly, the real estate agent expressed that he thought drugs should be legal and  
27 that people using drugs should not be sent to jail. App. 2 to Gov’t Response at 25-26.  
28 The real estate agent said that he was not comfortable with indicting in drug cases.

1 Although he did not say that he would refuse to indict in all cases involving drugs, he  
2 admitted that because of his beliefs, there was a chance that he would refuse to return an  
3 indictment in a drug case even though there was probable cause. Id. at 27. The real estate  
4 agent's responses established that he had serious concerns regarding the criminalization  
5 of drugs and could not be impartial with respect to these cases

6 That bias was the reason for the dismissal of the first two potential jurors is  
7 confirmed by the dismissal of a third potential juror. This juror stated that he had a  
8 strong bias for the Government. App. 2 to Gov't Response at 38. Judge Burns cautioned  
9 the juror that he should not "automatically defer to [the Government] or surrender the  
10 function and give the indictment decision to the U.S. Attorney. You have to make that  
11 independently." Id. at 40. Judge Burns emphasized once again the responsibility of the  
12 jurors to evaluate the facts of each case independently based on the evidence presented.  
13 Id. at 42-43. Demonstrating his even-handedness, Judge Burns explained, "I'm equally  
14 concerned with somebody who would say, 'I'm going to automatically drop the trap door  
15 on anybody the U.S. Attorney asks.' I wouldn't want you to do that." Id. at 44.

16 A reasonable grand juror would not have interpreted the dismissal of the first two  
17 potential jurors as a message that they must indict in all cases where probable cause is  
18 found or risk being excused from service. It was apparent to the other jurors that a lack  
19 of impartiality with respect to certain types of cases, *not* independence, was the reason for  
20 all three dismissals.

21 In sum, Judge Burns did not err in instructing the grand jurors that they were not  
22 to refuse to return an indictment on the ground that they disagreed with the laws.  
23 Furthermore, nothing in the video or Judge Burns' instructions nullified the grand jury's  
24 inherent power to refuse to indict for any reason whatsoever. As the Ninth Circuit noted  
25 in Navarro-Vargas II, 408 F.3d at 1204, the grand jury's independence results from the  
26 secrecy of their deliberations and the unreviewability of their decisions. Nothing in the  
27 record shows any impediment to that independence.

28 **B. Instructions re: Assistant U.S. Attorneys**

1       Defendant also contends that Judge Burns committed structural error by making  
2 comments about the Assistant U.S. Attorney's duty to present evidence that "cuts against  
3 the charge." According to Defendant, not only did Judge Burns' comments contradict  
4 United States v. Williams, 504 U.S. 36 (1992), but also discouraged independent  
5 investigation, leading to inaccurate probable cause determinations. Defendant reasons  
6 that given Judge Burns' comments, the grand jurors would have assumed that if the  
7 prosecutor did not present any exculpatory evidence, then none exists, rendering further  
8 investigation a waste of time.

9       Under Williams, prosecutors do not have a duty to present substantial exculpatory  
10 evidence to the grand jury. Although Assistant U.S. Attorneys apparently have an  
11 employment duty to disclose "substantial evidence that directly negates the guilt" of a  
12 subject of investigation (United States Attorneys' Manual § 9-11.233), it does not appear  
13 that they have a broad duty to disclose all evidence that may be deemed exculpatory or  
14 adverse to the Government's position.

15       Accordingly, Judge Burns' comments regarding the duty of Assistant U.S. Attorneys  
16 to present adverse evidence were inaccurate. However, Judge Burns' comments do not rise  
17 to the level of structural error. As discussed above, the video and Judge Burns stressed that  
18 the grand jury was independent of the Government. The video and Judge Burns also  
19 explained to the jury that they could direct the Assistant U.S. Attorney to subpoena  
20 additional documents or witnesses. App. I to Gov't Response at 11, 24. The jurors were  
21 also told about their right to pursue their own investigation, even if the Assistant U.S.  
22 Attorney disagrees with the grand jury's decision to pursue the subject. Id. at 12.

23       In light of the foregoing instructions, the Court does not agree that the grand jurors  
24 would assume that if the Government did not present any exculpatory evidence, none  
25 exists. A reasonable juror would understand that the Assistant U.S. Attorney may not be  
26 aware of certain exculpatory evidence, whether due to legitimate circumstances or  
27 inadequate investigation, and that further investigation by the grand jury may be needed  
28 to properly evaluate the evidence before them. Furthermore, Judge Burns told the jury

1 that "in *most* instances" the U.S. Attorneys are duty-bound to present exculpatory  
2 evidence. App. I to Gov't Response at 20. Based on this qualifying language, the grand  
3 jurors would have understood that the prosecutor is not always bound to present  
4 exculpatory evidence. Thus, "the structural protections of the grand jury" have not "been  
5 so compromised as to render the proceedings fundamentally unfair." Bank of Nova Scotia  
6 v. United States, 487 U.S. 250, 257 (1988).

7 **IV. CONCLUSION**

8 For the reasons discussed above, Defendant's Motion to Dismiss the Indictment  
9 Due to Erroneous Grand Jury Instruction is **DENIED**.

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12 DATED: December 5, 2007

13   
14 HON. JOHN A. HOUSTON  
United States District Judge

15 IT IS SO ORDERED.

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- 1 a. Creating false deductions and placing them in the Contributions section of their
- 2 clients' tax returns;
- 3 b. Creating false deductions and placing them in the Miscellaneous Business
- 4 Expense section of their clients' tax returns;
- 5 c. Falsifying amounts and placing them in the Child Care section of their clients' tax
- 6 return; and/or
- 7 d. Fabricating businesses to create false deductions

8 9. I also have probable cause to believe that the GARRETT'S evaded their personal  
income taxes during these years by underreporting a substantial amount of income earned  
through their tax preparation business.

10. The evidence of criminal activity set forth in this affidavit was obtained from an  
anonymous informant, undercover activities, a review of Federal Income Tax Returns,  
surveillance, IRS databases, publicly filed documents, information received from other IRS  
special agents, and information gained from my training and experience.

#### SOURCE OF THE INVESTIGATION

11. This investigation began as a referral from an anonymous informant. On or about March  
11, 2002, the informant reported to the IRS that FAYES TAX SERVICE prepared false tax  
returns for its clients. The informant prepared and submitted a report detailing the information  
about FAYES TAX SERVICE. The report listed the number 561-27-5934 as the SSN associated  
with FAYES TAX SERVICE. IRS records revealed that this number was issued to FE  
GARRETT. The report indicated that FE GARRETT prepared hundreds to thousands of tax  
returns each year. It is alleged that FE GARRETT prepared many tax returns containing false  
information in the "Gifts to Charity" and "Miscellaneous Deduction" sections of the tax return's  
schedule A. The informant stated that FE GARRETT'S clients were recruited through word of  
mouth or through recommendations from other clients who had received large refunds through  
claiming excessive deductions. Attached to this information, the informant provided a 2000 tax

1 return allegedly prepared by FE GARRETT. The report suggests that the informant is a tax  
2 preparer, and that a new client provided this tax return to the informant. Below the preparers'  
3 signature line on the return listed FAYES TAX SERVICE, 1210 E. 2<sup>nd</sup> St. National City, CA.  
4 91950. Although there was no personal identifying information of the taxpayer on the return  
5 provided, it contained deductions in the amount of \$10,800 in the "Gifts to Charity" and \$2,233  
6 in the "Other Miscellaneous Deduction" sections of the return. This enabled the taxpayer to  
7 receive a refund of \$2,280. These amounts were allegedly inflated figures that resulted in the  
8 taxpayer receiving a greater refund than they were entitled to.

9 12. Based on the informant information provided, a criminal investigation was initiated into  
10 FE GARRETT and FAYES TAX SERVICE.

#### 11 UNDERCOVER OPERATIONS

12 13. Based on the above mentioned information and information obtained from the informant  
13 and after analyzing tax returns, an Undercover Operation was initiated. On January 31, 2003,  
14 an Undercover Operation into the tax preparation activities of FE GARRETT was authorized.  
15 An Undercover Agent (UCA) was assigned to "shop" FE GARRETT'S tax business located at  
16 914 E. 8<sup>th</sup> Street National City, CA. ("Shopping" is a term commonly used by IRS-CI to describe  
17 Undercover Agents posing as clients in order to have a tax practitioner prepare their tax  
18 returns).

19 14. On February 10, 2003, an undercover agent (UCA) placed a consensually monitored  
20 phone call to the office of FE GARRETT in efforts to schedule an appointment to have an  
21 income tax return prepared for the year 2002. A male (later identified as GREG GARRETT)  
22 answered the telephone. He stated that FE GARRETT was not in the office and they were no  
23 longer accepting appointments to prepare tax returns due to the existing volume of returns they  
24 had to prepare with the approaching filing deadline. GREG GARRETT told the UCA that they  
25 could file an extension and leave their tax return information at FE GARRETT'S office for  
preparation.